

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

April 3, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2516

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**In re the Marriage of:
Richard G. Bedessem,**

Petitioner-Appellant,

v.

Donna J. Bedessem,

Respondent-Respondent.

APPEAL from judgment of the circuit court for La Crosse County:
JOHN J. PERLICH, Judge. *Reversed and cause remanded.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

DYKMAN, P.J. Richard Bedessem appeals from a divorce judgment. He argues that the trial court erred in awarding one-third of the Farmers State Bank stock he had received by gift to Donna Bedessem pursuant to a hardship determination. We conclude that refusal to divide the stock will not create a hardship on Donna, and therefore the trial court erred in dividing the stock. Accordingly, we reverse.

BACKGROUND

The facts are undisputed. Richard and Donna were married in Las Vegas, Nevada in 1963. They moved from California to Wisconsin in 1966 so that Richard could work at Farmers State Bank, where his father was president. He started to work at the bank on January 1, 1967 and eventually became executive vice president. As part of Richard's employment, he and Donna attended social functions on behalf of the bank. The bank received invitations for wedding receptions, baptisms and anniversaries, and Richard and Donna attended one or more of these events almost every weekend. Donna believed that this activity made a substantial contribution to the success of the bank.

Donna was primarily a housewife until 1977, when she started to work part time as a hostess at a restaurant. In 1980, Donna started to work full time for La Crosse County. She received treatment for depression several times during her employment and quit her job in 1991. She has held several full- and part-time positions since then. During the course of the marriage, Donna inherited approximately \$30,000. All of this money was spent, however, on debts and living expenses.

Richard and Donna were granted a divorce on April 30, 1996. Richard was fifty-four years old and Donna fifty-one. Richard continued to work at the bank, and Donna worked as a teacher's aide. The court awarded Donna \$2,800 per month in maintenance after finding that her earning capacity was \$17,000 to \$19,000 per year and that Richard's earning capacity was \$87,000 per year. The marital estate was divided equally, with each party receiving about \$30,000 in marital property.

At issue in this case is the trial court's division of 139 shares of Farmers State Bank stock. First, the court concluded that the stock was gifted to Richard and therefore was not subject to division unless failure to divide it would create a hardship.

Second, the court concluded that Donna would suffer a hardship if the stock was not divided. The court reasoned:

Each of these parties came into this marriage with virtually nothing. Both of them worked, both of them earned income, both of them earned a substantial income at times, both of them worked particularly hard to make the bank grow. And it is clear that [Donna] worked very hard along with [Richard] in those efforts. All of them wanted to make the bank successful, all of them helped to make the stock grow, and now [Richard] wants to exclude her from the benefit therefrom.

[Donna] inherited approximately \$31,000 or some \$30,000 in assets, all of which went into the marriage, all of which was used during the course of the marriage, all of which is now gone. [Donna] now finds herself after 30-some years of marriage with the inheritance gone, with only some \$30,000 of marital assets in her pocket, with some minimal mental health issues that have to be addressed, trying to get on with her life and support herself and survive. [Donna] has shown privation and hardship necessary to justify the division of the stock.

The court then awarded one-third of the stock, or forty-six shares, to Donna. Richard appeals from this determination.

STANDARD OF REVIEW

In *Doerr v. Doerr*, 189 Wis.2d 112, 121-22, 525 N.W.2d 745, 748-49 (Ct. App. 1994), we determined that the standard for reviewing a trial court's hardship determination:

is a three-step analysis that (1) begins with a review of the factual findings underpinning the trial court's determination, (2) moves to a consideration of whether the facts properly found by the court satisfy the definition of "hardship" and (3) examines whether, in light of that hardship, the trial court appropriately exercised its discretion in invading the nonmarital property.

Each step in the process has its own standard of review. The first step addresses the trial court's findings of fact Findings of fact are reviewable under the "clearly erroneous" standard. The second step measures the properly found facts against the ... definition of hardship

and that task, involving as it does the application of a general proposition of law to the facts of the case, is a question of law that we review de novo, owing no deference to the trial court's determination. The third and final step in the analysis is a review of the trial court's discretionary determination of whether the hardship warrants invasion of the nonmarital property under the particular circumstances of the case. That determination is ... subject to the deferential review that is generally accorded to discretionary rulings by the trial court.

(Citation omitted; footnotes omitted.) Richard does not challenge the trial court's findings of fact. Nor does he argue that the trial court erroneously exercised its discretion in awarding Donna one-third of the stock. Rather, he argues that the facts as found by the trial court do not support its hardship determination. This is a question of law that we review without deference to the trial court.

DISCUSSION

Section 767.255(2)(a), STATS., provides that property acquired by gift during the course of the marriage is not subject to property division. Section 767.255(2)(b) provides, however, that “[p]aragraph (a) does not apply if the court finds that refusal to divide the property will create a hardship on the other party ...” In *Popp v. Popp*, 146 Wis.2d 778, 792, 432 N.W.2d 600, 605 (Ct. App. 1988), we defined “hardship” as “a condition of financial privation or difficulty.” “Privation” is a “lack of what is needed for existence.” *Doerr*, 189 Wis.2d at 124, 525 N.W.2d at 750. Although a court does not need to determine that a party is in dire straits to find the existence of a hardship, it must find something more than an inability to maintain the predivorce standard of living. *Id.* Whether a hardship exists depends on the varying considerations of each individual case. *Popp*, 146 Wis.2d at 792, 432 N.W.2d at 605. And “hardship” is not the equivalent of “equity.” *Id.* at 792, 432 N.W.2d at 604-05. In other words, refusing to divide gifted property may not be equitable, but unless that refusal creates

hardship, the statute does not permit division of the property. The burden of proof lies with the party claiming a hardship. *Id.* at 793, 432 N.W.2d at 605.

The facts of this case, as found by the trial court, do not support its hardship determination. Donna received approximately \$30,000 in marital assets. The trial court also awarded her \$2,800 per month in maintenance and found that her income potential was \$17,000 to \$19,000. Adding these figures, Donna's gross income potential is at least \$50,600 per year. We cannot conclude that with this income and considering her expenses, she would encounter financial privation or difficulty.

The trial court relied on other facts in concluding that Donna has shown the hardship necessary to justify division of the stock. In dividing the stock, the trial court found that Donna worked hard to contribute to the success of the bank and had expended approximately \$31,000 in inherited assets during the course of the marriage. We agree that these are equitable reasons for dividing the stock. But a court cannot divide non-marital property solely on principles of equity and fairness. *Popp*, 146 Wis.2d at 792, 432 N.W.2d at 604-05. Rather, the court may divide the property only if failure to do so will create a hardship on the other party. Section 767.255(2)(b), STATS. The lack of hardship in this case precludes the trial court from dividing Richard's gifted stock.

Donna concedes that the maintenance will allow her to support herself in a reasonable fashion. She contends that the court's maintenance determination does not preclude a finding of hardship, however, because Richard could die, become ill or retire, all of which could terminate or reduce her maintenance. But § 767.255(2)(b), STATS., does not allow for the division of non-marital property based on speculative events. Rather, this section provides that gifted property may be divided if failure to divide the property "will create a hardship." (Emphasis added.) The facts of record do not establish that Donna *will* suffer a hardship if the stock is not divided. In any event, the record does

not indicate any health problems that would make Richard's life expectancy shorter than normal. Because the trial court erred in dividing the gifted stock, we reverse that part of the divorce judgment.

The trial court's decision to divide the stock may have affected its determinations regarding maintenance, property division and attorney's fees. For example, the trial court must consider "[w]hether one of the parties has substantial assets not subject to division by the court" when dividing marital property. Section 767.255(3)(c), STATS. The court must also consider the financial resources of both parties when deciding whether to award attorney's fees. Section 767.262(1), STATS. And a maintenance award can be affected by a court's property division. *See* § 767.26(3), STATS. Because we have reversed the trial court's decision to divide the gifted stock, we remand so that the trial court may reconsider its other determinations.

By the Court.—Judgment reversed and cause remanded.

Not recommended for publication in the official reports.

